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IN THE
COURT OF APPEALS OF INDIANA

VINCENT CRAIG STAPLETON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0603-CR-195
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON COUNTY COURT
The Honorable David W. Hopper, Judge
Cause No. 48E01-0305-FD-156

December 12, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Chief Judge

Vincent Craig Stapleton appeals his convictions for endangering a person while operating a vehicle while intoxicated[1] as a Class A misdemeanor, operating a vehicle with a blood alcohol content ("BAC") of .08[2] as a Class C misdemeanor, and operating a vehicle while intoxicated with a previous conviction within five years[3] as a Class D felony. Stapleton presents the following issues on appeal:

I. Whether the trial court erred when it denied Stapleton's motion to suppress his BAC results.

II. Whether the trial court erred in allowing the State to amend its charging information after the presentation of the evidence.

We affirm.

FACTS AND PROCEDURAL HISTORY

On April 5, 2003, a vehicle driven by Stapleton collided with a train in Anderson, Indiana. After the train stopped, the conductor went to Stapleton's vehicle where he found Stapleton with his head lodged in the windshield and smelling of alcohol. There were empty beer bottles in and around the vehicle.

Stapleton was removed from the vehicle, and transported via ambulance to Community Hospital in Anderson where he was treated for a head laceration, severely injured left arm, a fractured tailbone, and blood in his urine. As a part of the regular procedure for treating an accident patient, a nurse drew a sample of Stapleton's blood. The treating physician ordered a toxicology screen of Stapleton's blood based on his injuries, his loss of consciousness, his claim of amnesia, and his smell of alcohol.

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[1] *See* IC 9-30-5-2.

[2] *See* IC 9-30-5-1(a).

[3] *See* IC 9-30-5-3.

After drawing Stapleton's blood, the nurse put it into his pocket where it remained until he put it into a biohazard plastic bag with the physician's toxicology screen requisition. Then, in accordance with hospital procedure, the nurse placed the bag into a plastic tube and the plastic tube into the hospital's pneumatic delivery system for delivery to the laboratory. The sample arrived in the laboratory, and, according to hospital procedure, was verified as Stapleton's blood sample, spun in a centrifuge, and screened. The toxicology screen indicated that Stapleton had a BAC of not less than .13 and not greater than .17 grams of alcohol per 100 milliliters of his blood.

Anderson Police Officer Timothy Fedrick went to the hospital after completing his onsite investigation. There, he tried to interview Stapleton, who drifted in and out of consciousness unable to give a statement. The treating nurse informed Officer Fedrick that a BAC test had been performed at the request of the treating physician. Officer Fedrick made a written request for Stapleton's BAC screen results, which he received.

Stapleton was charged with: (1) endangering a person while operating a vehicle while intoxicated; (2) operating a vehicle with an alcohol concentration equivalent to at least .15 grams of alcohol per 210 liters of breath; and (3) operating a vehicle while intoxicated with a previous conviction within five years. At trial, over Stapleton's objection, the trial court admitted the BAC results into evidence, finding the tests were performed as part of Stapleton's medical treatment. At the end of the trial, the State moved to amend the charge of operating a vehicle with an alcohol concentration of .15 or more per 210 liters of breath to a charge of operating a vehicle with BAC of .15 or more

per 100 milliliters of blood.[4] The trial court granted the motion and sent the matter to the jury. The jury found Stapleton guilty of endangering a person while operating a vehicle while intoxicated and a lesser-included offense of operating a vehicle with a BAC of .08. Stapleton later pled guilty to operating while intoxicated with a prior conviction within the last five years. Stapleton now brings this appeal.

DISCUSSION AND DECISION

I. BAC Test Results

Stapleton contends that his BAC test results should not have been admitted into evidence over his objection because the blood samples were taken at the request of the investigating officer and not a physician, and because there was an improper chain of custody.

Evidentiary decisions are within the sound discretion of the trial court, and we may only reverse for an abuse of that discretion. *Wiggins v. State*, 817 N.E.2d 652, 655 (Ind. Ct. App. 2004). An abuse of discretion occurs if a trial court's ruling is clearly against the logic and effect of the facts and circumstances before it. *Id.* "In reviewing a decision entered with findings and conclusions, we must first determine whether the evidence supports the findings and second, whether the findings support the judgment." *Hannoy v. State*, 789 N.E.2d 977, 981 (Ind. Ct. App. 2003), *trans. denied.*

A. Request for BAC Test

Stapleton first argues that the trial court abused its discretion in admitting the BAC test results because they were the product of a warrantless search and seizure. Specifically, Stapleton argues that his toxicology screen was taken as part of an

[4] *See* IC 35-34-1-5(a)(5).

investigation and not as part of his medical treatment and that he did not provide informed consent.

As a general rule, the Fourth Amendment to the United States Constitution prohibits warrantless searches. *Id.* at 982. If there is no warrant, then "the burden is on the State to prove that, at the time of the search, an exception to the warrant requirement existed." *Id.* Ordinarily, a warrantless search of a person must be supported by probable cause. *Id.*

In *Hannoy*, we addressed the admissibility of toxicology screens taken without a warrant after an accident in *Hannoy*. There, the defendant challenged the admissibility of a blood draw taken at the request of an investigating officer after the defendant was involved in a serious accident causing death. 789 N.E.2d at 980-81. We held that a toxicology screen of blood taken by medical personnel at the request of the investigating officer was inadmissible in the absence of probable cause, but that blood screens taken for the hospital's own diagnostic purposes, which are later released to law enforcement, may be admitted. *Id.* at 992-93.

Here, Stapleton's screen was obtained at the request of the treating physician. As in *Hannoy*, samples obtained for medical treatment and later released to law enforcement are admissible and the trial court did not err in admitting test results.

B. Chain of Custody

Stapleton next asserts that the State failed to prove an adequate chain of custody for his blood sample. "The State bears a higher burden to establish the chain of custody of 'fungible' evidence, such as blood and hair samples, whose appearance is

indistinguishable to the naked eye." *Troxell v. State*, 778 N.E.2d 811, 814 (Ind. 2002). The State must reasonably assure that the evidence has remained undisturbed. *Id.* However, a perfect chain of custody is unnecessary, and once the State has strongly suggested the whereabouts of the evidence, any gaps in its custody go to weight of the evidence and not its admissibility. *Id*. Stapleton "must present evidence that does more than raise a mere possibility that the evidence may have been tampered with to mount a successful challenge to the chain of custody." *Id.*

The evidence presented at trial showed the chain of custody of the blood sample from the time it was taken until it arrived in the lab for testing. Although, there was no direct testimony from the individual who undertook the screen, the Administrative Director of Community Hospital Laboratory in Anderson testified: (1) that he ensures the laboratory's operations comply with the hospital guidelines; and, (2) as to the standard procedure for handling and receiving a specimen. *Tr*. at 268-69. This testimony was sufficient for the trial court to infer that there was a proper chain of custody of Stapleton's blood sample. The trial court did not err in admitting the BAC results.

II. Amended Charging Information

Stapleton argues that the trial court committed reversible error by allowing the State to amend its charging information at the end of the presentation of the evidence to a measure of blood instead of breath. Stapleton contends that he was prejudiced as a result of the amendment because his defense was the absence of the conversion between the two measurements.

"Amendment to charging information may occur at any time as long as it does not prejudice substantial rights of defendant, which include the right to sufficient notice and opportunity to be heard regarding the charge." IC 35-34-1-5(c); *Sides v. State*, 693 N.E.2d 1310, 1312 (Ind. 1998). A defendant waives his right to claim prejudice when he fails to move for a continuance after the trial court grants the State's requested amendment. *Hancock v. State*, 758 N.E.2d 995, 1002 (Ind. Ct. App. 2001), *trans. granted in part on other grounds.* Here, Stapleton's failure to make such a motion waived his right to claim prejudice.

Affirmed.

SHARPNACK, J., and MATHIAS, J., concur.